Office-Supreme Court, U.S.
FILED
NOV 27 1984
ALEXANDER L. STEVAS,
CLERK

(5)

No. 84-329

In the Supreme Court of the United States

OCTOBER TERM, 1984

BANK OF NOVA SCOTIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

23pp

QUESTIONS PRESENTED

1. Whether the lower courts' enforcement of a grand jury subpoena issued to petitioner was proper despite petitioner's claim that compliance with the subpoena would violate foreign law and a foreign judicial decision.

2. Whether a fine of $25,000 per day imposed as a contempt sanction to coerce petitioner's compliance with the grand jury subpoena was civil in nature.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 7

Conclusion 18

TABLE OF AUTHORITIES

Cases:

Banco Nacional de Cuba v. *Sabbatino*, 376 U.S. 398 13

California Bankers Ass'n v. *Shultz*, 416 U.S. 21 9

Chase Manhattan Bank, In re, 297 F.2d 611 ..... 10, 14

Grand Jury Proceedings (Bank of Nova Scotia I), In re, 691 F.2d 404, cert. denied, 462 U.S. 1119 ..... 4, 8, 13, 14

Grand Jury Proceedings (Field), In re, 532 F.2d 404, cert. denied, 429 U.S. 940 14-15

Ings v. *Ferguson*, 282 F.2d 149 ..... 10, 14

Rogers v. *Lodge*, 458 U.S. 613 17

Shillitani v. *United States*, 384 U.S. 364 15

Societe Internationale Pour Participations Industrielles v. *Rogers*, 357 U.S. 197 ..... 10, 11, 12

Page

Cases—Continued:

United States v. *First National Bank*, 699 F.2d 341 ..... 10, 13, 14

United States v. *First National City Bank*, 396 F.2d 897 14

United States v. *Powell*, 379 U.S. 48 14

United States v. *Ryan*, 402 U.S. 530 12

United States v. *Vetco, Inc.*, 644 F.2d 1324, cert. denied, 454 U.S. 1098 ..... 11, 15

Westinghouse Electric Corp. Uranium Litigation, In re, 563 F.2d 992 15

Miscellaneous:

Restatement (Second) of Foreign Relations Law of the United States (1965) 7, 13, 14, 15

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-329

BANK OF NOVA SCOTIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 740 F.2d 817. A prior opinion of the court of appeals (Pet. App. 1c-3c) is reported at 722 F.2d 657. Orders of the district court (Pet. App. 1b-17b, 1d-3d, 1e-2e, 1f-2f, and 1g-2g) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1984, and the petition for a writ of certiorari was filed on August 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner challenges orders of the United States District Court for the Southern District of Florida holding it in civil contempt for failing to comply with prior orders of the

court enforcing a federal grand jury subpoena and imposing a fine of $1,825,000.

Petitioner is a Canadian banking corporation headquartered in Toronto (Pet. App. 2a). On March 4, 1983, its office in Miami, Florida, was served with a grand jury subpoena issued by the United States District Court for the Southern District of Florida (*ibid.*). The subpoena required petitioner to produce financial documents pertaining to two individuals and three companies from its branches in the Bahamas, the Cayman Islands, and Antigua (*ibid.*).[1] In a letter dated March 23, 1983, to the Assistant United States Attorney handling the grand jury proceedings, counsel for petitioner requested, inter alia, " 'a sworn statement regarding the nature of the evidence sought by the subpoena and its relation to the investigation' " (*id.* at 3b). On March 29, 1983, one of petitioner's agents appeared before the grand jury and declined to produce the subpoenaed documents (*ibid.*).

On April 4, 1983, petitioner filed a motion to quash the subpoena, contending that compliance with the subpoena would violate the bank secrecy laws of the Bahamas and the Cayman Islands (Pet. App. 2a-3a). On April 27, 1983, the district court denied petitioner's motion and ordered petitioner to comply with the subpoena by May 31, 1983 (*id.* at 1g-2g). The district court also directed the government "to provide any reasonable assistance" to the petitioner, "especially in dealing with the foreign governments," but expressly held that the government was not required to forward letters rogatory (*id.* at 2g).

---

[1]Petitioner determined that there were no documents responsive to the subpoena at its Antigua branch, and thus that aspect of the subpoena is not at issue. Pet. App. 2a n.1.

During May 1983, petitioner did not attempt to comply with the district court's order by searching for subpoenaed documents (Pet. App. 3a). Instead, petitioner spent its time making numerous requests of the government to send letters rogatory and to show the materiality and necessity of the subpoenaed documents to the grand jury investigation (*ibid.*). The government repeatedly responded that it was willing to furnish any requested assistance short of showing materiality and necessity or sending letters rogatory (*ibid.*).

Petitioner's only effort to comply with the court's order during May consisted of the filing on May 27, 1983, of a petition with the Grand Court of the Cayman Islands, in which it sought permission to disclose documents called for by the subpoena (Pet. App. 3a, 4b). The Cayman court denied the petition on May 31, 1983, and ordered petitioner not to produce the subpoenaed documents (*id.* at 5b). Petitioner never appealed this order to the Court of Appeals in Jamaica (*id.* at 4a, 5b).

On June 1, 1983, the district court conducted a hearing at which petitioner again requested the court to direct the government to make a showing of the materiality and necessity of the subpoenaed documents to the grand jury investigation and to issue an order containing findings of materiality and necessity (Pet. App. 5b). At the same time, however, petitioner's counsel expressed uncertainty as to whether the requested showing and findings would satisfy the Cayman court (*id.* at 5b-6b). The government, "declining to lay open its entire grand jury investigation for the purpose of proceeding in the foreign court," again expressed willingness to provide any assistance short of making the showing requested by petitioner or sending letters rogatory (*id.* at 6b).

On October 10, 1983, the district court issued an order in which it concluded that "the government has done all that it is required to do by law and by this Court's order of April

27, 1983 in connection with the enforcement of its subpoena" and that "[t]here can be no doubt that the Bank must comply with the subpoena" (Pet. App. 2f). Thus, the court directed petitioner to comply with the subpoena by October 17, 1983, or face a contempt hearing on October 21, 1983 (*ibid.*). Well before this time, petitioner knew, as a result of litigation relating to a different grand jury subpoena, that the Eleventh Circuit had rejected its claims that it was entitled, by virtue of the conflict between the enforcement of the subpoena and the requirements of foreign bank secrecy laws, to a showing of materiality or the issuance of letters rogatory before being compelled to produce subpoenaed records; petitioner also knew that this Court had declined review of these issues. *In re Grand Jury Proceedings (Bank of Nova Scotia I)*, 691 F.2d 1384 (11th Cir. 1982), cert. denied, 462 U.S. 1119 (1983).

Petitioner's only effort to locate any documents either in the Bahamas or the Caymans between June 1, 1983, and the scheduled contempt hearing was an October 14, 1983, search of petitioner's office in Nassau, which produced no documents (Pet. App. 4a). Petitioner produced only one document during the seven months following the issuance of the subpoena (*ibid.*).

The district court held a contempt hearing on October 20, 1983 (Pet. App. 1e). In an order issued that day, the court determined that, "[a]s of October 20, 1983, there is clear and convincing evidence that the Bank has not turned over the subpoenaed materials and thus, the Court finds the Bank in contempt of the order of October 10, 1983" (*ibid.*). The court also made a supplemental finding, dated October 24, 1983, that petitioner had not exercised good faith in its efforts to comply with the subpoena (*id.* at 2d). The court imposed a fine of $25,000 per day, to take effect on October 26, 1983, and to remain in effect until the sooner of petitioner's purging itself of civil contempt by complying with

the October 10 order or the expiration of the grand jury (*id.* at 2e). Petitioner appealed from the order of contempt, and the court of appeals stayed the accrual of the fine from October 25, 1983, until November 14, 1983 (*id.* at 4a).

On November 11, 1983, the Attorney General of the Bahamas issued an order allowing petitioner to produce those subpoenaed documents that might be located in the Bahamas (Pet. App. 4a). The Attorney General concluded that the Bahamian bank privacy statute did not prohibit disclosure because petitioner's Bahamian branches did not have an account relationship with the subjects of the subpoena (*ibid.*). Thus, on November 14, 1983, just before the court of appeals lifted the stay of the fine, petitioner produced several documents from its Bahamian branches and asserted that there were no other documents in the Bahamas (*id.* at 4a-5a). The Assistant United States Attorney insisted, however, that other Bahamian documents were still missing (*id.* at 5a). Although petitioner disagreed, it subsequently produced numerous additional documents from its Bahamian branches (*id.* at 5a-9a).

On November 11, 1983, the Grand Court of the Cayman Islands reconsidered petitioner's application for permission to disclose the subpoenaed documents but again refused to grant such authority (Pet. App. 5a). However, on November 17, 1983, pursuant to Section 3(2)(b)(iv) of the Confidential Relationship (Preservation) Law of 1976 (as amended in 1979) (the Cayman bank secrecy statute), the Governor of the Cayman Islands authorized the disclosure of the subpoenaed documents (Pet. App. 5a). On that same day, petitioner produced all of the documents called for by the subpoena from its Cayman branch (*ibid.*). At that time, the government again informed petitioner that a substantial number of documents from the Bahamian branches still had not been produced (*ibid.*). Petitioner did not complete the production of Bahamian documents until January 25, 1984 (*id.* at 6a-9a).

The court of appeals heard oral argument on petitioner's appeal from the contempt order on December 12, 1983 (Pet. App. 8a). Thereafter, the court remanded the case to the district court for further proceedings but retained jurisdiction over the case (*id.* at 1c-3c). One reason for the remand was to permit the district court to consider the significance of informal procedures developed through an exchange of letters between the governments of the United States and the Cayman Islands, which were alleged to have afforded a means by which the government could have obtained the subpoenaed documents (*id.* at 8a n.7).

At a hearing on February 14, 1984, the district court received evidence concerning the "letter agreements" between the United States and the Cayman Islands, known as the "Gentlemen's Agreement" (Pet. App. 9b-12b). The district court determined that the Gentlemen's Agreement was not binding on the United States and that, even if it were, it did not require the government to resort to the procedures under the agreement in this case (*id.* at 15b). Thus, on February 28, 1984, the district court issued an order in which it held that enforcement of the subpoena in this case was proper and directed entry of judgment against petitioner in the amount of $1,825,000 — a fine of $25,000 per day from the date that the court of appeals lifted the stay of the fine through the date on which petitioner completed production of all documents called for by the subpoena (Pet. App. 1b-17b).

Petitioner then appealed the imposition of the fine (Pet. 9). The court of appeals consolidated that appeal with petitioner's pending appeal from the contempt order and affirmed both of the district court's orders (Pet. App. 1a-28a). The court of appeals agreed with the district court's finding that petitioner had failed to exercise good faith in its efforts to comply with the subpoena, adding that the "flurry of activity undertaken by the Bank to discover documents

after the trial court entered its order of contempt cannot save the Bank from the consequences of its previous extensive pattern of delay" (*id.* at 15a). The court of appeals rejected petitioner's contention that the government was required to demonstrate the relevance of the documents sought (*id.* at 13a) and held that the district court had properly analyzed this case under the balancing test of the Restatement (Second) of Foreign Relations Law of the United States (1965) [hereinafter cited as Restatement] (Pet. App. 16a-20a). The court of appeals also held that "[t]he gentlemen's agreement procedure is a far cry from constituting a substantially equivalent alternative to a grand jury subpoena" (*id.* at 23a). The court emphasized that the Gentlemen's Agreement was not even applicable to cases such as this one, in which the United States is concurrently investigating tax and narcotics offenses (*id.* at 22a-23a). The court of appeals further noted that the procedures under the agreement had not, in any event, resulted in the expeditious production of bank records (*id.* at 23a n.21). The court summed up its conclusions as follows (*id.* at 27a-28a (citations omitted)):

> The district judge in this case was extremely patient. He gave the Bank ample chances to comply with the subpoena. But the Bank was just sloppy in its search. The remedy for violation of the district court's order is civil contempt. The imposition of a coercive fine is not improper * * * and will be reversed only for an abuse of discretion. * * * The order of contempt and the fine in this case did not constitute an abuse of the district court's discretion.

ARGUMENT

1. Petitioner urges this Court to address the question whether "a neutral non-party witness [may] be held in civil contempt for abiding by foreign criminal laws and judicial decisions barring the production of documents located abroad when an effective alternative means of securing the

same documents on a government-to-government basis exists" (Pet. i). As it did in *Bank of Nova Scotia* v. *United States*, 462 U.S. 1119, in which this Court denied a petition for a writ of certiorari on June 13, 1983, petitioner contends (Pet. 9) that the decision below conflicts with principles enunciated by this Court and other courts of appeals. Petitioner also contends (Pet. 15-16) that the decision of the court below solicits "international lawlessness" and thus represents a departure from the accepted and usual course of judicial proceedings requiring this Court's intervention.

Contrary to petitioner's argument, the decision below is not in conflict with any decision of this Court, and the courts of appeals are in basic agreement on the appropriate analytic framework to employ in cases of this sort. Moreover, the record in this case does not support petititoner's contentions and does not raise the question petitioner seeks to have reviewed. Accordingly, review by this Court is not warranted.

a. Two principal premises underlying the question posed by petitioner are contrary to the record in this case. First, petitioner was not held in contempt and fined "for abiding by foreign criminal laws and judicial decisions" (Pet. i). Petitioner bases its entire argument on the bank secrecy law of the Cayman Islands, conveniently ignoring the fact that virtually the entire fine in this case was attributable to petitioner's failure to produce documents located in the Bahamas (Pet. App. 16a n.14).[2] But the bank secrecy law of the Bahamas did not bar petitioner's production of subpoenaed records located in that country (*id.* at 4a), and petitioner knew that fact three days before the contempt fine

---

[2]Of the total fine, only $100,000 is attributable to days on which petitioner was found to be in contempt for its failure to produce documents located in both countries. Thereafter, the fine continued mounting solely because of petitioner's failure to conduct a diligent search of its Bahamian branches (Pet. App. 14a-15a).

began to accrue (see page 5, *supra*). Thus, a determination that the fine was proper does not require consideration of the impact of the law of the Cayman Islands on petitioner's ability to comply with the subpoena.[3]

Second, this is not a case in which "an effective alternative means of securing the same documents on a government-to-government basis exists" (Pet. i). As both the district court and the court of appeals determined (Pet. App. 22a-23a & n.21, 15b), the "Gentlemen's Agreement" between the United States and the Cayman Islands did not bind the United States, had proven to be ineffective as a means of obtaining bank documents, and was not even available in this case because the grand jury investigation concerned tax offenses as well as narcotics offenses. Thus, the factual predicate for petitioner's argument is totally lacking.[4]

---

[3]For the same reason, the briefs of amici curiae filed in support of the petition address irrelevant issues by focusing solely on the asserted conflict between the laws of the United States and the Cayman bank secrecy statute.

[4]The question posed by petitioner also assumes that petitioner is a "neutral" non-party. But it is hardly clear that a bank in petitioner's position should be viewed as a completely neutral entity. This Court has recognized that banks are not "conscripted neutrals" in transactions involving negotiable instruments and that they derive significant benefits from such transactions. *California Bankers Ass'n* v. *Shultz*, 416 U.S. 21, 48-49 (1974). It goes without saying that other types of transactions with their customers are beneficial to banks as well. Bank secrecy laws of tax havens such as the Cayman Islands undoubtedly attract business for offshore banks. Indeed, as the court of appeals stated (Pet. App. 17a), "[t]he Cayman Islands * * * sees preservation of bank secrecy as vital to the expansion of the Island's principal industry—banking and off-shore finance." As a beneficiary of the expansion of that industry, a bank doing business in the Caymans would have an obvious commercial interest in resisting compliance with a grand jury subpoena and advancing the notion that the bank secrecy laws of that country are an absolute bar to compliance with such a subpoena.

b. Petitioner contends (Pet. 11-15) that the decision of the court of appeals conflicts with this Court's decision in *Societe Internationale Pour Participations Industrielles* v. *Rogers*, 357 U.S. 197 (1958), and with the decisions of the Second and Seventh Circuits in *In re Chase Manhattan Bank*, 297 F.2d 611 (2d Cir. 1962); *Ings* v. *Ferguson*, 282 F.2d 149 (2d Cir. 1960); and *United States* v. *First National Bank*, 699 F.2d 341 (7th Cir. 1983). Petitioner's contention lacks merit. The decision below is not in conflict with *Societe Internationale* or *First National Bank*, and *Chase Manhattan Bank* and *Ings* do not represent the current state of the law in the Second Circuit.

In *Societe Internationale*, a Swiss holding company was seeking to recover assets that had been seized by the Alien Property Custodian under the Trading with the Enemy Act. This Court held that the district court had properly ordered production of Swiss records pursuant to the government's discovery request, despite the plaintiff/Swiss-holding-company's claim that Swiss law limited its ability to satisfy the production order because those producing the records would have been exposed to possible criminal sanctions under Swiss law (357 U.S. at 204-206). Petitioner relies (Pet. 11-12) on the Court's further holding that dismissal of the holding company's complaint was not an appropriate sanction for failure to comply with the discovery request in light of the fact that the holding company had unquestionably made good faith efforts to comply with the production order and because the holding company had certain constitutionally protected rights to maintain the suit (357 U.S. at 208-213). But the Court made it clear that the district court had discretion to impose lesser sanctions (357 U.S. at 213).[5]

---

[5]For example, the Court recognized that in the absence of complete disclosure, the district court might be justified in drawing inferences adverse to the holding company as to particular events (357 U.S. at 213).

Accordingly, as recognized in *United States* v. *Vetco, Inc.*, 644 F.2d 1324, 1329 (9th Cir.), cert. denied, 454 U.S. 1098 (1981), *Societe Internationale* "did not erect an absolute bar to summons enforcement and contempt sanctions whenever compliance is prohibited by foreign laws."

In the instant case, unlike *Societe Internationale,* there has been no alleged taking of petitioner's property. Nor, in light of the consent to disclosure ultimately received by petitioner from the Caymans, has petitioner demonstrated that it faced a genuine risk that compliance with the subpoena would subject it to criminal sanctions.[6] Moreover, the district court expressly found (Pet. App. 13b, 2d), and the court of appeals agreed (*id.* at 14a), that petitioner did not make a good faith effort to comply with the subpoena. Nearly all of petitioner's efforts were devoted to trying "to obtain from the goverment what it was clearly not entitled to receive; a showing of materiality and necessity and the issuance of letters rogatory" (*ibid.*).[7] Although petitioner sought the permission of the Grand Court of the Cayman Islands to comply with the subpoena, it did not appeal the Cayman court's denial of its petition — a litigation decision that stands in marked contrast to the vigor with which it has pressed its arguments in the courts of this country.[8] Moreover, petitioner apparently did not attempt to obtain

---

[6]Furthermore, given the importance attached by the Cayman Islands to its banking industry (see note 4, *supra*), it is by no means clear that that country's government would consider it appropriate to prosecute a bank for disclosing records in a case such as this one.

[7]Petitioner notes (Pet. 15 n.14) that there is a conflict among the circuits on the question whether the government should be required to demonstrate the relevancy and materiality of information sought by a grand jury subpoena. Petitioner does not, however, seek resolution of this asserted conflict.

[8]Petitioner argues (Pet. 13) that an appeal would have been pointless because it did not have information as to materiality necessary under the Cayman statute and had no basis for challenging the legal standard

authorization to disclose from the Governor of the Cayman Islands until it was faced with the $25,000 per day fine.[9] Thus, petitioner's position is significantly different from that of the plaintiff in *Societe Internationale*, and the decision of the court of appeals is not in conflict with *Societe Internationale*.[10]

---

for releasing bank records. But petitioner points to no authority suggesting that it would have been fruitless to attempt to persuade the court of appeals in Jamaica to adopt a balancing test and defer to the superior interests of the United States in this case.

[9]In light of the importance attached by the Cayman Islands to its banking industry, petitioner's situation in this case was analogous to that of a foreign company "in a most advantageous position to plead with its own sovereign for relaxation of penal laws or for adoption of plans which will at the least achieve a significant measure of compliance with the production order." *Societe Internationale*, 357 U.S. at 205.

[10]Nor is the decision below in conflict with any other decision of this Court. Petitioner cites (Pet. 12) *United States* v. *Ryan*, 402 U.S. 530, 534 (1971), for the proposition that sanctions may not be imposed on a witness who has made a good faith effort to comply with a subpoena but is unable to do so for fear of criminal prosecution by a foreign government. *Ryan* does not state that proposition. In that case, the respondent had moved to quash a subpoena duces tecum requiring the production of records located in Kenya on the ground that Kenyan law forbade the removal of the records. The district court denied the motion and ordered the respondent to seek from the Kenyan government permission to remove the documents from Kenya and, in the event that permission was denied, to grant United States agents access to the documents in Kenya. This Court held that the district court's order was not an appealable temporary injunction. In reaching that conclusion, the Court pointed out that a valid subpoena requires a good faith effort to comply, noted that respondent had asserted that compliance with the subpoena would violate Kenyan law, and read the district court's order as doing nothing more than informing "respondent before the event of what efforts the District Court would consider sufficient attempts to comply with the subpoena." Significantly, this Court expressed no opinion whether the district court was required to accept as a sufficient attempt unsuccessful efforts to obtain permission to remove the documents from Kenya.

Although petitioner does not expressly seek review of the issue, it also contends (Pet. 14 n.13) that the court of appeals "misapprehended the

Nor is the decision below in conflict with *United States* v. *First National Bank, supra.* In that case, arising out of an IRS summons enforcement proceeding seeking information pertaining to the IRS's collection efforts, the court expressly recognized that a foreign bank secrecy law did not automatically bar a domestic court from compelling production of bank records (699 F.2d at 345). The court held, however, that under the balancing test of Section 40 of the Restatement, the summons in that case ought not to be enforced (699 F.2d at 345). The court distinguished, on a number of factual grounds, the Eleventh Circuit's decision in *In re Grand Jury Proceedings (Bank of Nova Scotia I),* 691 F.2d 1384 (1982), cert. denied, 462 U.S. 1119 (1983), on which the courts below relied in this case. The Seventh Circuit pointed to, inter alia, the following distinctions: the court of appeals in *Bank of Nova Scotia I* had the benefit of findings of fact by the district court, including a finding that the Bank had not made a good faith effort to comply with the subpoena; the information in *Bank of Nova Scotia I* was

---

teaching of this Court in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964)." However, the act of state doctrine considered in *Sabbatino* is plainly inapplicable here because the courts below did not sit in judgment on any acts of the government of the Cayman Islands done within its own territory. See *Sabbatino,* 376 U.S. at 416. Rather, the courts below determined that petitioner did not make a good faith effort to obtain the consent of a foreign government. Furthermore, whatever the merits of petitioner's legal arguments as to the separation of powers and act of state doctrines, the government did not in this case "seek[] to use judicial power as a tool to achieve a political objective, such as the alteration or subversion of domestic law in friendly foreign countries" (Pet. 14 n.13). The government's objective here was simply to obtain evidence needed for the grand jury investigation. Any possible effect of enforcement of the subpoena at issue on a foreign government's policy decisions was purely incidental. As this Court pointed out in *Sabbatino,* 376 U.S. at 423, "it cannot of course be thought that 'every case or controversy which touches foreign relations lies beyond judicial cognizance.' *Baker* v. *Carr,* 369 U.S. 186, 211."

sought by a grand jury rather than by the civil tax collector; Bahamian law permitted disclosure with the customer's consent, while the Greek law at issue in *First National Bank* did not; and the power of a Bahamian court to permit disclosure did not appear to be as strictly limited as that of a Greek court (699 F.2d at 346-347). Although the government does not agree that all of these factual distinctions advanced by the Seventh Circuit justify the result it reached,[11] *First National Bank* is similarly distinguishable from the instant case. Thus, there is no legal conflict requiring this Court's resolution.

Petitioner's assertion that there is a conflict between the Eleventh Circuit and the Second Circuit is erroneous. The Second Circuit has receded from its position in *In re Chase Manhattan Bank, supra,* and *Ings* v. *Ferguson, supra,* that principles of international comity preclude enforcement of a subpoena that might require the subpoenaed party to violate foreign law. See *United States* v. *First National City Bank,* 396 F.2d 897, 901-905 (2d Cir. 1968). Like the Seventh Circuit in *United States* v. *First National Bank, supra,* and the Eleventh Circuit in the instant case, the Second Circuit employed the balancing test of Section 40 of the Restatement in its analysis in *First National City Bank* (396 F.2d at 902).

The Restatement's test also has been adopted by the Fifth, Ninth, and Tenth Circuits, and no circuit employs a contrary test. See *In re Grand Jury Proceedings (Field),* 532

---

[11]For example, there is no meaningful distinction between the national interest in grand jury investigations and IRS investigations. As this Court recognized in *United States* v. *Powell,* 379 U.S. 48, 57 (1964), the investigative function of the IRS is essentially the same as that of the grand jury. And, of course, the collection of taxes is essential to the financial integrity of this country. *In re Grand Jury Proceedings (Field),* 532 F.2d 404, 408 (5th Cir.), cert. denied, 429 U.S. 940 (1976).

F.2d 404, 408 (5th Cir.), cert. denied, 429 U.S. 940 (1976); *United States* v. *Vetco, Inc.*, 644 F.2d at 1330; *In re Westinghouse Electric Corp. Uranium Litigation*, 563 F.2d 992, 997 (10th Cir. 1977). Accordingly, there is no merit to petitioner's suggestion (Pet. 13) that this Court should review the appropriateness of looking to the Restatement's balancing test for the resolution of cases such as this one.

2. Petitioner also contends (Pet. 16-18) that the assessment of the fine in this case was punitive and that the fine was imposed without petitioner's being accorded rights to which it would have been entitled in a criminal contempt proceeding. But the record clearly establishes that the fine was properly imposed to coerce petitioner to comply with the grand jury subpoena.

The district court set out the objective of its October 20 contempt order in no uncertain terms (Pet. App. 2e): "The crux of what this Court seeks in this order is the submission of the subpoenaed materials to the grand jury and not the punishment of the Bank." The order provided that petitioner could purge itself of civil contempt by "complying with this Court's order of October 10, 1983" (*ibid.*). The October 10 order required petitioner "to comply with subpoena duces tecum 83-1 served on the Bank on March 4, 1983 no later than October 17, 1983" (*id.* at 2f). Thus, petitioner had a full opportunity to purge itself of contempt and avoid the fine by simply producing the subpoenaed records, and the contempt order and the fine imposed in this case therefore were unquestionably civil in nature. See *Shillitani* v. *United States*, 384 U.S. 364, 368-370 (1966).[12]

---

[12]If immediate compliance with the subpoena had been impossible despite the taking in good faith of all reasonable steps to comply, petitioner could have sought relief from the district court. It did not seek such relief while the fine was running. Moreover, as the court of appeals determined (Pet. App. 14a-15a), the record establishes that petitioner's delay in the production of documents pursuant to the subpoena was far

Petitioner nevertheless contends that the fine was punitive because it was assessed for a period of time after petitioner had "complied" with the contempt order (Pet. 17-18). Petitioner reads that order as merely requiring it to end its assertion of foreign law as a bar to compliance with the subpoena. Thus, petitioner argues that it "complied" with the order once it stopped asserting that foreign law precluded the production of subpoenaed documents and it produced the Cayman documents. Petitioner's reading of the contempt order is untenable. Under the plain terms of that order and the October 10 enforcement order, nothing less than production of all of the subpoenaed documents (the Cayman documents *and* the Bahamian documents) would have sufficed to purge petitioner of contempt.

Petitioner also argues (Pet. 18) that the purpose of coercing it to produce documents was satisfied by December 5, 1983, when it had produced all documents from its Bahamian branches except copies of four vouchers pertaining to certificates of deposit that had been redeemed in April 1979; these vouchers were turned over to the government on January 25, 1984 (Pet. App. 9a). Petitioner asserts (Pet. 18) that by December 5, neither the government, petitioner, nor the district court had any reason to believe that any of petitioner's evidence had not been produced.

The continuing need for a coercive fine after December 5 is an entirely fact-bound issue, and petitioner has not advanced any sound reason why this Court should review

---

from excusable. Petitioner did not perform a diligent search upon receipt of the district court's enforcement order. And until the fine started to accrue, petitioner ignored numerous warnings from the government that its production of Bahamian documents was incomplete, and it failed to search for records in obvious places. In short, the coercive effect of the fine was unquestionably necessary to obtain petitioner's compliance with the subpoena and the court's enforcement order.

the factual determinations of the two courts below. See *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982). In any event, in claiming that a fine was unnecessary, petitioner ignores the record. At the December 12, 1983, oral argument before the court of appeals, the government disagreed with petitioner's assertion that it had fully complied with the subpoena (Pet. App. 8a n.7). Moreover, petitioner had reason to know that its production was incomplete. Each of the vouchers was one of the copies included in a four-part form whose parts were separated and independently routed through the Bank (*id.* at 9a n.8). Petitioner's personnel should have been familiar with the Bank's own procedures and forms. Thus, it should have been obvious to Bank personnel that submissions before January 25, 1984, lacked these vouchers. While petitioner attempts to minimize the significance of the vouchers (Pet. 18), each is the only document of a four-part form on which a "paid" stamp appears (Supp. C.A. Br. for the United States 30). Thus, these documents were necessary to present a complete series of transactions regarding the certificates of deposit to which they pertained. At any rate, whatever the importance of these documents, petitioner was under an obligation to produce them, and its failure to exercise due diligence to find them manifested a continuing failure to take the district court's enforcement order seriously.

Further evidencing petitioner's continuing failure to take the district court's enforcement order seriously even after December 5, 1983, was petitioner's failure to send a representative to appear before the grand jury. On December 9, the Assistant United States Attorney informed petitioner that a Bank employee was needed to appear before the grand jury on December 20, 1983, to authenticate documents that had been produced (Pet. App. 8a). Petitioner waited until December 19 to notify the employee who was

to appear (*ibid.*). Because of this delay, the witness's appearance before the grand jury had to be rescheduled for January 24, 1984 (*ibid.*).

It is clear from petitioner's conduct throughout this proceeding that, absent a coercive fine, there was no assurance that petitioner would fully comply with the subpoena. Thus, the fine in this case was not punitive, and its imposition does not raise any issue requiring review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

GLENN L. ARCHER, JR.
Assistant Attorney General

MICHAEL L. PAUP
ROBERT E. LINDSAY
ALAN HECHTKOPF
Attorneys

NOVEMBER 1984

DOJ-1984-11